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Supreme Court, U.S.
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Docket No. _____

SUPREME COURT of the UNITED STATES

Donald C. Marro

Petitioner

v.

Virginia Electric and Power Co., Inc

Respondent

On Petition For Writ of Certiorari

from the Supreme Court of Virginia and

Fauquier County (VA) Circuit Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it an unjust taking, denial of due process and impairment of right to contract to grant prescriptive easement constructively and in disregard of established procedures.

2. Is it an unjust taking, denial of due process, impairment of right to contract and denial of the right to petition to deny relief for Respondent's continued use of Petitioner's property because damages proofs failed in an earlier trespass action but no right of use was ever proved by Respondent.

3. Does it deny the right to petition to deny Petitioner adjudication of Respondent's right to use his property because Petitioner sold the property well after filing suit.

4. Is equal protection, due process and the right to petition denied, and is it an unjust taking, to sanction seeking relief for use of a property when no easement had been proved.

JURISDICTIONAL BASIS

This Petition for Certiorari is brought under 28 USC 1257.

Petitioner contends the state court allowed an unjust taking by a "state actor", Respondent Virginia Electric and Power Co., Inc., denied him procedural and substantive due process, equal protection, access to the courts, and impaired his right to contract.

The Virginia Supreme Court declined to review a Fauquier County Circuit Court final order of March 7, 2007. An application for Rehearing was denied on September 25, 2007.

This Court should note the Virginia Supreme Court declined jurisdiction when the petition for appeal was inadvertently filed 11 days late. The Notice of Appeal had been timely filed on March 27, 2007.

OPINIONS BELOW

No official reports were of the opinions below. All opinions are in the Appendix.

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STATEMENT OF THE CASE

I. Summary

This case arises from a simple question, i.e., did Respondent have an easement for its power distribution line on Petitioner's property. Despite 3 lawsuits on this question, such easement has never been decided.

From 7/27/95 until 6/30/06, Petitioner resided at and owned 2082 Winchester Rd, Delaplane, Virginia (the "Property").

Over that time, Respondent's lines were on the Property, a distribution line and one line each powering the main and tenant house.

Respondent believed it had a recorded easement for its lines but found it did not. Respondent then claimed prescriptive easement but never proved it in any of 3 suits between the parties. Respondent continued to use the Property nevertheless, during and after and despite these repeated legal challenges, without ever having proved prescription.

By 2005 and the third suit, the trial court had grown tired of the controversy, characterized Petitioner as vexatious because of it, awarded Respondent sanctions without giving Petitioner an opportunity to be heard, and even ordered Petitioner to make no motion for reconsideration of its rulings.

The federal questions were raised in the Complaint at 11 et seq, by Motion To Certify Questions to the Virginia Supreme Court (held moot by the trial court's dismissal of the Declaratory Judgment counts), in the 9/5/06 order, and in the Petition For Appeal.

The trial court threatened Petitioner with further sanctions if an attempt to raise such questions on motion to reconsider was made, therefore Petitioner made a Motion To Certify Questions instead.

II. Details

In 1998, Respondent came on the Property to trim trees along its distribution line for the first time during Petitioner's occupancy.

4 trees were trimmed before Petitioner discovered Respondent and ordered it off the Property. 1 tree soon died, 1 died in 2005, and the others became permanently disfigured.

The controversy thus began January 21, 2001, in Fauquier County General District Court in a suit soon removed by Respondent to Fauquier Circuit Court. (CL01-227)

Petitioner was denied leave to amend nominal damages set for the General District Court when there had been hope of compromise.

The trespass counts were then nonsuited and re-filed as CL03-348 with higher damages.

CL03-348 failed, before Respondent's case was presented.

The trial court, on Respondent's motions during and after Petitioner's case in chief, held Petitioner could not testify to his own damages or his realtor expert rely on lengthy experience but rather must have researched dimunition in value specifically.

Actual damages were thus held not proved and nominal damages were held unavailable.

CL03-348 review was sought and denied.

As Respondent's power lines remained on Petitioner's property with easement still not adjudicated, Petitioner filed a new suit for Declaratory Judgment as to easement, and if the court found favorably, or alternatively, for ejectment, loss of quiet enjoyment and continuing trespass. A negligence count was also included for the tree death after the earlier suit, CL03-348, concluded, and for the by-now permanent tree disfigurements.

Respondent then brought its own separate suit for Declaratory Judgment on its right to use Petitioner's property, and for Injunctive relief to enter the Property and trim trees.

Injunctive relief was granted to Respondent.

Petitioner's Declaratory Judgment and at-law action, and Respondent's Declaratory Judgment action, were then consolidated.

Respondent then moved to bar Petitioner's action, including Declaratory Judgment, on res judicata grounds arising from both earlier suits, CL01-227 and CL03-348.

Respondent's res judicata plea was granted as to the at-law counts but denied as to Declaratory Judgment, the trial court finding there was but "one tort, one damage event" but not proof of easement.

The trial court stated it wished to prepare a written opinion on the matter but lacked the time therefor.

Thus, the trial court was silent on the effect a Declaratory Judgment ruling favoring Petitioner could have when damages or relief otherwise available were precluded by its res judicata ruling on the at-law counts. The trial court was also silent on how Respondent could ask Declaratory Judgment in its action when it claimed Declaratory Judgment as to easement was res judicata.

Petitioner then moved to have damages and easement questions certified for review. Meanwhile, rather than prove its prescriptive easement claim, Respondent instead moved to dismiss the two pending Declaratory Judgment counts on grounds Petitioner lost standing by having recently sold the Property.

Dismissal was granted.

Respondent also sought sanctions under Virginia statute, 8.01-271.1 Petitioner was not given opportunity to be heard in opposition, and sanctions were granted.

Petitioner sought fee documents from Respondent who moved to quash. Respondent set that motion for a date Petitioner had objected to and advised he was unavailable.

The trial court heard the motion anyway, in Petitioner's absence, and gave an advisory opinion amounting to quashing the subpoena.

A hearing on sanctions amounts was held later. Petitioner had to examine from a fees affidavit not subpoened documents.

Further, the trial judge testified from the bench on the reasonableness of Respondent's travel times.

Sanctions of $8,300 were awarded, this time in a letter opinion which characterized Petitioner as "vexatious".

Petitioner again had no opportunity to be heard to oppose this characterization so proffered evidence to show a "vexatious" characterization *ultra vires* and groundless.

A final order was entered March 7, 2007, and Notice of Appeal timely made on March 21.

Constitutional Provisions/Virginia Statutes
(in pertinent part)

U.S. Constitution, Article I, Section 10
"No state shall pass any bill or law impairing the obligations of contracts."

U.S. Constitutional Amendments, Amendment I
"the right of the people to petition the Government for a redress of their grievances"

U.S. Constitutional Amendments, Amendment V
"nor shall private property be taken for public use without just compensation"

U.S. Constitutional Amendments, Amendment XIV
"nor shall a State deprive any person of life, liberty or property without due process nor deny..equal protection of laws"

Virginia Statutes

8.01-136: "action of ejectment is retained"

8.01-158: "file with motion....damages.....for destruction to...other property"

8.01-159: "damages....assessed by the court....[or] party or court [ask for] jury"

8.01-184: "circuit courts have power to make binding adjudications of right, whether or not consequential relief is claimed"

8.01-186: "further relief...on declaratory judgment whenever necessary or proper"

8.01-187: "determined in declaratory judgment action that person's property...taken or damaged...and compensation not paid...appoint condemnation jurors"

Argument

1. Respondent is a state actor.

2. Property use by a state actor without having an easement is a taking.

3. Improvident dismissal before deciding a right of property use is also a taking, denies procedural and substantive due process, and the right to petition.

4. Judicially permitting Respondent to use Petitioner's property without proving an easement impairs the right to contract.

5. Improvidently denying Petitioner relief otherwise available after a favorable adjudication of a property right denied procedural and substantive due process.

6. Denying Petitioner the relief otherwise available from favorable adjudication of a property right denied equal protection.

7. A res judicata bar to relief otherwise available from favorable adjudication of a property right denies equal protection when the bar did not apply to Respondent or declaration of the underlying right.

8. Sanctions for seeking to protect a property right denies right to petition.

9. Denying tree damages that occurred only after an earlier suit had concluded was an unjust taking.

1. **Respondent is a state actor.**

A threshold issue is whether Respondent is a state actor. It is.

That arises from its power supply right (*Johnson v. Resources For Human Dev.*, (E.D. Pa 1994) 843 F. Supp 974), coercive power exercised by injunction and other court orders (*Edmonson v. Leesville Concrete*, 500 U.S. 614; *Blum v. Yaretsky*, 457 U.S. 991), the court action itself (*Mooney v. Holohan*, 294 U.S. 1965) and holdings that public utilities are state actors. *Center v. ConEd*, (E.D. NY 1974) 376 F. Supp. 699; *Ihrke v. No. States Power*, (8th Cir. 1972) 459 F.2d 566

2. **Property use by a state actor without having an easement is a taking.**

Respondent never proved an easement and had no recorded easement but occupied and used Petitioner's Property anyway. That constitutes a taking.

When state actor occupies land for own use, even minimally, it is a taking. *Palazzolo v. R.I.*, 533 U.S. 606

Compensation is then due for the period when the taking was effective. *Lucas v. S.C Coastal Council*, 505 U.S. 1003 A property interest is not to be even temporarily deprived. *Craig v. Carson*, (M.D. Fla 1978) 499 F. Supp. 385 Indeed, there may be no private property taking without compensation. *Appleby v. City of Buffalo*, 221 U.S. 524

3. Improvident dismissal before deciding a right of property use is also a taking, and denies procedural and substantive due process and the right to petition.

Improvident dismissal before deciding a right of use constructively allowed such use and was a taking. That no evidence had been presented to support easement and no opportunity given Petitioner to rebut denied due process. *Saunders v. Shaw*, 244 U.S. 317

Improvident dismissal is also a taking of Petitioner's Declaratory Judgment and at-law rights of action. *Alliance of Descendants v. U.S.*, (Fed Cir. 1978) 37 F.3d 1478 [cause of action is property subject to taking]

Petitioner was entitled to adjudicate property rights using a Declaratory Judgment procedure established at Code of Va 8.01-184. Improvident dismissal thus denies procedural due process. *Bluth v. Laird*, (4th Cir. 1970) 435 F.2d 1065 [when sovereign sets procedure then deviates, violates procedural process]

Dismissal also denied substantive due process. Petitioner has a right to dispose of property. *Buchanan v. Warley*, 245 U.S. 60 Statutory relief was available had there been a favorable rights declaration. (Code of VA at 8.01-186, 187) *U.S. ex rel; Siegal v. Follette*, (S.D. NY 290 F.Supp. 632 [right given by state legislature protected from arbitrary denial]

This trial judge by 2005 and the third suit was not impartial and saw Petitioner as vexatious. Trial judge bias is a procedural due process violation also. *Marshall v. Jerrico*, 446 U.S. 238; Craig, supra, p. 390

Finally, Petitioner was denied his right to petition, a right not conditioned on his motive. *Barnes Foundation v. Township*, (E.D. Pa 1996) 927 F.Supp 874. It violates

court access if legitimate efforts at redress are obstructed. *Galazo v. City of Waterbury*, (D. Conn 2004) 303 F. Supp 2d 213

4. Judicially permitting Respondent's property use without proof of easement impaired Petitioner's right to contract.

Had there been a rights declaration that favored Petitioner, Petitioner and Respondent would have been free to contract. [competent persons to have utmost liberty to contract] *Twin City Pipe v. Harding Glass*, 283 U.S. 353

Improvident dismissal denied this. Indeed, 11 years of use by Respondent during Petitioner's occupancy arguably had already formed an implied contract whose obligations were thus impaired by dismissal. [contract obligations may not be destroyed] *Combes v. Getz*, 285 U.S. 434

Implied contracts are constitutionally protected. *Semaphore Entertainment Group v. Gonzalez*, (D. PR 1996) 919 F.Supp 543

5. Improvidently denying relief otherwise available from a favorable adjudication of a property right denies procedural and substantive due process.

Dismissal of at-law counts was premature and consequently improvident. As the trial court held easement was not adjudicated, then neither could its forms of relief be.

Further, if the procedural steps for proving easement were violated by improvident dismissal, substantive due process for relief downstream following a rights declaration as to easement must of necessity also be.

Moreover, the quiet enjoyment, ejectment and continuing trespass counts prematurely and improvidently dismissed are available also as alternatives to declaratory judgment if continuing trespass was present.

Accordingly, due process was denied.

6. Denying Petitioner the relief otherwise available from favorable adjudication of a property right denies equal protection.

It denies equal protection to confine Petitioner to a lesser remedy *Harper v. VA Dept. of Taxation*, 509 U.S. 86

or to burden Petitioner's fundamental rights. *In re: Asbestos*, (3rd Cir. 1987) 829 F.2d 1233

Ejectment relief is a statutory right in Virginia for trespass. (Code of VA 8.01-136) Quiet enjoyment of property is likewise an available and protected right. *Shelley v. Kraemer*, 334 U.S. 1 [equality in enjoyment of basic civil rights includes right to enjoy property]

7. A *res judicata* bar to relief otherwise available from favorable adjudication of a property right denies equal protection when the bar did not apply to Respondent or declaration of the underlying right.

The trial court, urged on by Respondent, plainly concluded Petitioner's suit was an inconvenience even though Respondent itself sought Declaratory Judgment.

The trial court never explained how it reconciled this inconsistency but foreclosed, nevertheless, the relief otherwise available to Petitioner from favorable Declaratory Judgment and even sanctioned Petitioner for asking such relief.

From this it appears that Petitioner was singled out

for discriminatory treatment, was deprived of a fundamental right of access and punished by the trial court, at Respondent's behest, for exercise of his right of access.

This denies equal protection.1

Petitioner was of a suspect class given his pro se status, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, and was treated differently with intent to punish or inhibit exercise of his constitutional rights. *Gillum v. Nassau Downs OTB*, (E.D. NY 2005) 357 F. Supp. 2d 564

8. Awarding sanctions for suit on property rights denies due process and access.

Sanctions were awarded Respondent by the trial court for Petitioner's at-law counts of continuing trespass, ejectment, loss of quiet enjoyment and negligence. Petitioner was also characterized as "vexatious".

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1) *Nadeau v. Helgemoe*, (1st Cir. 1977) 561 F.2d [denial of fundamental right not justified by convenience]; *Personnel Adm'r of MA v. Feeney*, 442 U.S. 256 [decision maker selected course of action because of effect on identifiable group; *Arroyo Vista Partners v. Santa Barbara*, (C.D. Cal 1990) 732 F. Supp 1046 [irrational and plainly arbitrary actions]; *Griffin v. People of the State of Illinois*, 351 U.S. 12 [invidious discrimination]

This denies due process and the right to petition. [denial of due process to penalize for access] *Natural Gas v. Slattery*, 302 U.S. 300; [court procedure cannot deny fundamental right] *West v. Louisiana*, 194 U.S. 258

Filing suit has significant constitutional protections *Hoeber v. Local 30*, (3d Cir. 1991) 939 F.2d 118, with liability for petitioning only on sham. *Sierra v. Butz*, (N.D. Cal 1972) 949 F.Supp 1124

Sham was never shown. Sound reasons for the at-law counts were already noted.

The trial court utterly ignored the continuing trespass attending the absence of easement adjudication. "It violates court access if legitimate efforts at redress obstructed." *Galazo v. City of Waterbury*, (D. Conn 2004) 303 F. Supp 2d 213. "It is substantial chill on first amendment if there are reprisals to individuals." *Master Printers v. Donovan*, (4th Cir. 1984) 751 F.2d 700.

Further, it is "selective prosecution [if a punitive statute is applied] when exercising a protected right." *WalMart v. Rodriguez*, (D. PR 2002) 238 F. Supp 2d 395;

Ciechon v. Chicago, (7th Cir. 1982) 686 F.2d 511 [even if procedures legitimate, must not be applied vindictively]

"States may not ignore First Amendment under the guise of preventing professional misconduct". *NAACP v. Button*, 371 US 415 "When fundamental right is burdened, it must be more than unsupported assertion that the burden is connected to public policy." *Carey v. Population Svcs. Int'l*, 431 U.S. 678

Petitioner's good name was also sullied, yet no opportunity to be heard was provided. "When a person's good name is affected by government action, notice and opportunity to be heard are essential." *Bd of Regents of State Colleges v. Roth*, 408 U.S. 564; *Wisconsin v. Constantineau*, 400 U.S. 433

Petitioner was further denied the right to obtain evidence on the fees claimed as sanction. Moreover, the trial judge even testified from the bench on the reasonableness of the times claimed by Respondent for travel. [higher standard of due process if sanctions intended to punish] *Media Duplication* Svcs. *v. HDG Software*, (1st

Cir. 1991) 928 F.2d 675

9. Denying damages for tree death that occurred only after an earlier suit had concluded was an unjust taking.

The 2005 tree death had not been claimed in either the first or second suit, nor could it have since it was yet to occur. Neither were the permanent tree disfigurements.

There is to be "no arbitrary spoliation of property under the 14th Amendment." *CIT Corp. v Commonwealth*, (Va 1929) 149 S.E. 523, citing *Barbier v. Connolly*, 113 U.S. 27

"A claim is to be allowed for taking for the death of trees." *Cooper v. U.S.*, (Fed Cir. 1987) 827 F.2d 762

"An owner is to be put in as good a position after a taking as before." *U.S. v. Virginia Power*, 365 U.S. 624

Since Respondent continued to use the Property without easement, any argument that these prospective damages could or should have been claimed earlier is vitiated, even if prospective damages were permissible at

all, and they are not.

CONCLUSION

Constitutional safeguards for property and petition were made meaningless by the proceedings below.

Respondent urged on and used the trial court to demonize a *pro se* and circumvent its obligations to prove a right of use.

The trial court ignored constitutional protections for property because it had grown weary of the controversy and was indisposed to have law explicated by a *pro se* litigant.

For all the foregoing reasons, and for these latter in conclusion particularly, we would respectfully submit there is ample and substantial reason to grant this Petition.

Respectfully,

December 18, 2007

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VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY
(WARRENTON DIVISION)

DONALD C. MARRO

PLAINTIFF

V. AT LAW NO.

VIRGINIA ELECTRIC AND POWER COMPANY, INC.

DEFENDANT

MOTION FOR JUDGMENT

COMES NOW Plaintiff, DONALD C. MARRO "Marro"), pro se, and moves this Court for judgment against defendant VIRGINIA ELECTRIC AND POWER COMPANY, INC. ("VAPOWER") as follows.

NATURE OF ACTION

1. This action is for declaratory judgment as to the right of VAPOWER to have its power lines on Mr. Marro's property, or for ejectment, loss of quiet enjoyment, trespass and negligence if an adequate remedy at law precludes declaratory judgment.

THE PARTIES

2. Plaintiff Marro resides at and since 7/27/95 owns in fee simple 2082 Winchester Road, Delaplane, in Fauquier County, Virginia (the ("Property"). He is, and at all times relevant to this action has been, a citizen of the Commonwealth of Virginia. For allegations made herein on information and belief, plaintiff believes evidentiary support will be forthcoming after reasonable opportunity for discovery.

JURISDICTION AND VENUE

3. Defendant VAPOWER is a corporation organized under the laws of North Carolina and doing business in Virginia.

4. This Court has jurisdiction of this case pursuant to Code of Virginia Section 8.01-328 et seq.

5. Venue is proper in this district pursuant to Code of Virginia 8.01-262 (3) and (4).

FACTUAL BACKGROUND

6. Marro is a VAPOWER electric power

customer, receiving, pursuant to statute, electric power under tariff from VAPOWER.

7. VAPOWER has its power lines on the Property, including a distribution line ("Main Line") and two service lines to bring power from the Main Line to Marro's house and to a tenant house.

8. The Property is on Rt. 17 and landscaped extensively, including mature trees nearby and under the Main Lines, by a pond and near the creek which runs along the front of the Property.

9. Defendant VAPOWER has no easement for its Main Line or its service lines. However, plaintiff accepts the placement of the service lines, will grant an easement therefor and does not otherwise challenge their placement.

10. Because its Main Line is located there, VAPOWER claims a right to enter the Property and trim trees thereon. Though there is no easement, VAPOWER threatened termination of Marro's

power if entry for tree-trimming for the Main Line was denied.

11. VAPOWER has no right to use the Property, has deprived Marro of his property rights, commits a continuing trespass by its Main Line placement and negligently injured Marro's trees.

COUNT I
DECLARATORY JUDGMENT

12. Plaintiff incorporates the preceding paragraphs.

13. An actual, justiciable controversy has arisen between the parties for which there is no adequate remedy at law.

14. Defendant VAPOWER claims a prescriptive easement for its Main Line on the Property, which claim plaintiff disputes.

WHEREFORE, a judgment as to the respective rights of the parties is appropriate.

COUNT II
EJECTMENT

15. Plaintiff incorporates the preceding paragraphs and pleads this Count and those following in the alternative in the event the Court finds there are adequate remedies at law.

16. Defendant on November 26, 2003, expressly claimed an interest in the Property, based upon a recorded easement.

17. Defendant subsequently admitted it had no recorded easement but claimed a prescriptive easement instead.

18. Defendant was afforded opportunity to adjudicate its claim of interest by prescriptive easement but failed to do so.

19. Plaintiff's evidence shows no easement by prescription.

20. Defendant's claim to and use of plaintiff's Property has caused a dimunition of Property value and deprived plaintiff of the use of his land,

for which recovery may be made.

WHEREFORE, plaintiff prays $200,000 for dimunition in value, rental damages of $37,500, punitive damages of $50,000, interest and costs of suit.

COUNT III
LOSS OF USE AND QUIET ENJOYMENT OF PROPERTY

21. Plaintiff incorporates the preceding paragraphs.

22. Placement by VAPOWER of its Main Line on the Property without an easement has deprived plaintiff of quiet enjoyment of his property and of the right to use the Property as he wishes, including adding value thereto by further landscaping.

23. Plaintiff's Property value has been reduced thereby.

24. Defendant has had ample notice its Main Line placement has deprived plaintiff of quiet

enjoyment and the aforesaid other uses, declined to relocate the Main Line or pay for an easement, or to prove prescriptive easement at trial.

25. The continuing placement is thus willful and wanton, and shows conscious disregard for the rights of plaintiff, therefore punitive damages are appropriate.

WHEREFORE, the plaintiff demands judgment against defendant VAPOWER for $200,000, punitive damages of $50,000, interest from 7/27/95, and costs of suit.

COUNT IV
TRESPASS

26. Plaintiff incorporates the preceding paragraphs.

27. Since defendant has no easement for its Main Line on the Property, placement thereof is a continuing trespass.

28. Placement of its Main Line has caused

dimunition in value of the Property.

WHEREFORE, plaintiff prays $200,000 or nominal damages, punitive damages of $50,000, interest, and costs of suit.

COUNT V
NEGLIGENCE PER SE

29. Plaintiff incorporates the preceding paragraphs.

30. VAPOWER has a statutory duty not to injure plaintiff's trees.

31. VAPOWER breached that duty. Four willow trees were trimmed by VAPOWER over the years since 1989. One died in 2000 and is the subject of litigation now on appeal. One other has died in 2005 and two others have become permanently misshapened.

32. The trees' injuries were foreseeable, recklessly indifferent to plaintiff's statutory rights and willful, and therefore allow punitive damages.

WHEREFORE, plaintiff prays for damages of $24,000 for the value of the trees and/or dimunition in property value occasioned by injuries to these trees, punitive damages of $50,000, interest from 5/01/05, and costs of suit.

FOR ALL OF THE FOREGOING, the plaintiff demands judgment against defendant as follows:

1. $261,500 for compensatory damages;

2. $ 50,000 for punitive damages;

3. Interest as stated until satisfaction of judgment;

4. Costs of suit.

June 20, 2005 by: /s/

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VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

DONALD C. MARRO,
Plaintiff/Respondent,

V.

CONSOLIDATED CASES:
CL05-213 & CH05-157

VIRGINIA ELECTRIC AND POWER COMPANY,
Defendant/Petitioner.

ORDER

On July 31, 2006, the parties came before this Court to be heard on Virginia Electric and Power Company's Plea of Res Judicata and Demurrer. Certain evidence was introduced and the Plea of Res Judicata (the "Plea") was argued by the parties, Mr. Marro, pro se, and Virginia Electric and Power Company, by counsel.

Upon consideration thereof, this Court hereby denies the Plea as to Count I (Declaratory Judgment) of the Motion for judgment, and grants the Plea as to Count II (Ejectment), Count III (Loss of Use and Quiet Enjoyment of Property), Count IV

(Trespass), and Count V (Negligence Per Se) of the Motion for Judgment, without leave to amend the pleadings. Furthermore, as requested and argued by counsel for Virginia Electric and Power Company, this Court hereby imposes monetary sanctions against Donald C. Marro pursuant to Virginia Code 8.01-271.1, for fifty percent (50%) of the time spent by defense counsel on the Plea of Res Judicata in this matter. A hearing for this Court to review and determine the actual award of sanctions may be set on a later date.

This Court directs that the Plaintiff, Donald C. Marro, file no motion for reconsideration of these rulings, no further actions in reference to this particular case seeking any recovery for damages, and no claim related to tree trimming or cutting that may have occurred before July 31, 2006, on the property at 2082 Winchester Road, Delaplane, Virginia. Any such actions that are filed will be met with sanctions.

All of which is ADJUDGED and ORDERED.

ENTER: /s/ Jeffrey W. Parker, JUDGE

DATE: September 5, 2006

I ask for this with respect to the Court's rulings on Counts II, III, IV, and V, as well as to the Court's ruling on sanctions. Seen and objected to with respect to the Court's ruling on Count I, for the reasons stated in the record of this proceeding:

/s/ Christian B. Franklin, Esq.
Parrish, Houck & Snead, P.L.C.
Post Office Box 7166
Fredericksburg, VA 22404-7166
(540) 373-3500
Counsel for Virginia Electric and Power Company

Seen and Objected To As Noted on the Exhibit 1, attached.

/s/ Donald C. Marro
3318 Bust Head Road
The Plains, Virginia 20198
Plaintiff/Respondent, pro se

Exhibit 1
Objections To Order

The Order to which this is attached is Seen and Objected to as follows:

as to res judicata
The Order is Agreed as to the part thereof denying the Plea of Res Judicata as to Count I, Declaratory Judgment, which seeks a declaration of the rights of the parties concerning the placement of defendant's power lines on plaintiff's property.

The Order is Objected To as to the part thereof granting the Plea of Res Judicata as to Counts II-V in which remedies were sought for alleged violations of plaintiff's property rights. The Counts for which the Plea was granted were pleaded in the alternative to the Declaratory Judgment Count in the event that the court found adequate remedies at law (Complaint at paragraph 1) for the alleged violation of plaintiff's property rights.

It would plainly appear to be an absurdity abhorred by the law to rule plaintiff's property rights have not been adjudicated whereas his remedies for alleged violations of those rights have been adjudicated. Denying plaintiff remedies for alleged violations of his unadjudicated property rights denies due process and equal protection.

Finally, the aforesaid part of the Order is Objected To on the grounds set forth in the Opposition papers, and since res judicata does not apply prospectively to future events and a continuing trespass.

as to sanctions

The Order is Objected To as to the granting of sanctions for all the foregoing and on the grounds that such a ruling squarely contradicts this Court's own ruling in the previous matter, CL03-348, upon which the res judicata plea rests, that no adjudication of defendant's claim of a prescriptive easement was made therein, thereby requiring the instant lawsuit to adjudicate this issue and protect plaintiff's rights.

The Court further ruled that sanctions were granted to obtain "finality" in CL03-348 (7/31/06 hearing transcript, page 61), a ground for sanctions not contemplated by 8.01-271.1 nor even a possibility given the Court's ruling that no prescriptive easement had been proved in the matter for which "finality" was sought.

as to further pleadings

The Order is Objected To as to the part thereof precluding further pleading if other trees were damaged by the tree-trimming event set forth in the previous actions, on grounds that a single tree-trimming event that does not result in immediate damage cannot give rise to an action until damage is evident. This is a pro forma objection challenging only the fact and reasoning of this ruling as there is no apparent damage now and no future cause of action contemplated by plaintiff giving rise to this Objection.

VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY/
WARRENTON DIVISION

DONALD C. MARRO
PLAINTIFF

AT LAW NO. 05-213

V.

CHANCERY NO. 05-157

VIRGINIA ELECTRIC AND POWER COMPANY, INC.
DEFENDANT

Plaintiff's Reply to Defendant's Opposition to Certified Questions

Plaintiff replies to defendant's Opposition as follows.

1. Plaintiff moved for certification of five (5) questions:

Questions To Be Certified

1. Are damages from alleged property rights violations precluded by an earlier damages ruling when the underlying rights were not adjudicated and in fact are pending adjudication, and when the damages arise from continued property use.

2. Do Virginia Code sections 8.01-186 and 187, Article I, Section II of Virginia's Constitution and Code sections 8.01-158 and 159 preserve plaintiff's right to damages notwithstanding an earlier damages ruling.

3. Does finding no damages proved in an earlier trespass action for having poles on plaintiff's property without easement allow leaving the poles there without proving easement and preclude damages or remedies for having kept them there.

4. Does a declaratory judgment seeking an adjudication of property rights during a time certain terminate when one party thereto no longer is entitled to the property right in question.

5. Is it sufficient to maintain a declaratory judgment action if damages and a sanctions question turn upon the outcome of the declaration. (Memorandum in Support at p. 2)

2. Defendant makes it appear the res judicata ruling is what is chiefly implicated by the certified questions when it is plainly the results of a pending declaratory judgment ruling that informs all the certified questions.

3. Defendant also makes a show of being uncertain as to the authority under which plaintiff proceeds with his instant motion. Defendant overlooks the first paragraph of plaintiff's Memorandum in Support which reads as follows:

"This supports plaintiff's motion to certify under 8.01-670.1"

4. Defendant offers nothing to support its position that the certified questions should be denied beyond its contention that defendant

"does not agree that it is in the parties' best interests to seek an interlocutory appeal" (Opposition at 6)

5. This language is indeed part of the statute but since the Supreme Court has not interpreted the statute, its language has not yet been construed. Plainly the parties' best interests are served by finality in adjudication. That finality is unavailable absent a reviewing courts determination of the questions proposed here to be certified whose pendency would otherwise defeat finality.

Also, the trial court is not obliged to stay proceedings pending such appeal. From this and the plain language that the court and the parties must agree, it appears the legislative intent was for the trial court to be final arbiter of the parties best interests, just as it is when other interests of parties compete.

WHEREFORE, the questions should be certified.

VIRGINIA: IN THE CIRCUIT COURT OF FAUQUIER COUNTY

DONALD C. MARRO,
Plaintiff/Respondent,

v. CONSOLIDATED CASES:
CL05-213 & CH05-157

VIRGINIA ELECTRIC AND POWER COMPANY,
Defendant/Petitioner.

FINAL ORDER

On November 30, 2006, the parties came before this Court to be heard on Virginia Electric and Power Company's Motion to Dismiss, Motion for Summary Judgment and Motion for Order Awarding Sanctions, and Mr. Marro's Motion for Certified Questions or a Briefing Schedule. Certain evidence was introduced. The parties, Mr. Marro, pro se, and Virginia Electric and Power Company, by counsel, presented arguments.

Upon consideration thereof, this Court hereby grants Virginia Electric and Power Company's Motion to Dismiss and Motion for Summary Judgment. Mr. Marro's Motion for Certified Questions or a Briefing Schedule was mooted thereby.

Furthermore, as requested and argued by counsel for Virginia Electric and Power Company, this Court hereby imposes monetary sanctions against Donald C. Marro pursuant to Virginia Code 8.01-271.1, in the amount of One Hundred Dollars ($100.00) in conjunction with the Motion for Summary Judgment, and in the amount of Eight Thousand Three Hundred Dollars ($8,300.00) in conjunction with the Pleas of Res Judicata and Motion for Order Awarding Sanctions (for the reasons

specifically set forth in this Court's letter opinion dated January 8, 2007, which is attached to and incorporated into this Final Order).

Therefore, judgment is hereby entered in favor of Virginia Electric and Power Company and against Donald C. Marro in the amount of Eight Thousand Four Hundred and 00/100 Dollars ($8,400.00). This judgment shall accrue interest at the judgment rate (6% per annum) from the date of entry of this Final Order until paid.

These consolidated matters are concluded and ended and shall be placed among the ended causes of this Court.

All of which is ADJUDGED and ORDERED.

ENTER: /s/ Jeffrey W. Parker, JUDGE

DATE: March 7, 2007.

I ASK FOR THIS:

/s/ Christian B. Franklin, Esq.
Parrish, Houck & Snead, P.L.C.
P. O. Box 7166
Fredericksburg, VA 22404-7166
(540) 373-3500
Counsel for Virginia Electric and Power Company

SEEN AND Objected To As Set Forth On the Exhibit Attached and On the Record

/s/ Donald C. Marro
3318 Bust Head Road
The Plains, VA 20198
Plaintiff/Respondent, pro se

Exhibit 1
Objections to Proposed Order

The final order disposing of this matter incorporates directly a letter opinion.

Set forth in that letter opinion are two previous matters that appear to be relied on to justify the sanctions ruling and sanctions amount, although the matters were long since closed; no evidence thereof was introduced at any hearing herein or judicial notice thereof requested; sanctions were requested in both earlier matters and denied; the so-called "minimal damages" cited by the trial court in the first matter reflected nothing more than plaintiff's desire to keep the matter in the General District Court – from whence Virginia Power removed before judgment there – and also reflects denial of plaintiff's motion for leave to amend the damages prayer so trespass and rent counts could be heard in the first action instead of becoming the basis for nonsuit and a second action; and, finally, misstates that the earliest case was decided on measure of damages not on an independent contractor defense that Virginia Power had nowhere set forth in their grounds of defense therein.

All of the foregoing constitute plaintiff's objection to the proposed order and his effort to make a complete record for appellate review.

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

JEFFREY W. PARKER, JUDGE
40 CULPEPER STREET
WARRENTON, VIRGINIA 20186

January 8, 2007

Mr. Donald C. Marro
3318 Bust Head Road
The Plains, VA 20198

Christian B. Franklin, Esq.
701 Kenmore Avenue, Suite 100
Fredericksburg, VA 22401

Re: Marro v. Virginia Electric & Power Co.
Circuit Court of Fauquier County
Consolidated Cases: CL05-213 & CH05-157

Dear Mr. Marro & Mr. Franklin:

This matter comes before the Court concerning the monetary award which should be awarded Virginia Electric & Power Co. (Vepco) in this case consistent with the Court's Order of September 5, 2006.

In that Order, this Court sustained Pleas of res judicata to the damage counts of the consolidated pleading, but permitted the declaratory judgment action to continue. In addition to the plea, Counsel for Vepco has requested monetary sanctions against the Plaintiff, Donald Marro (Marro) pursuant to Va. Code Section 8.01-271.1. This Court granted that relief (to be fixed upon further hearing) in an amount equal to one half of the time billed by defense counsel to Vepco in handling the plea.

On November 30, this Court received an affidavit setting forth the billable time expended on this matter by Vepco's attorney, heard evidence in the form of oral testimony and arguments of both counsel and Mr. Marro. The Court took this matter under advisement to further review the submission of Mr. Franklin, Vepco's counsel.

Prior to setting forth its award of attorneys' fees, this Court feels that a brief review of the history of this matter is in order.

On July 27, 2001, Donald C. Marro (Marro) filed his Motion for Judgment containing eight (8) Counts against Virginia Electric & Power Company (Vepco). Two of those Counts, to wit; rent and trespass were non-suited and ultimately contained in a second lawsuit filed in November of 2003. Both of these law suits, which were heard independently, centered around a claim of damages resulting from the trimming of certain trees adjacent to a Vepco power line located on Marro's property. In its defense, Vepco claimed an easement across the property of Marro and further claimed the right to trim the adjacent trees.

Marro claimed that not only did Vepco not have an easement, but that the trimming was done negligently and without permission, and therefore, he was owed monetary damages.

Both the 2001 and the 2003 lawsuits, as well as the current lawsuits, were the subject of numerous, if not vexatious motions praeciped by Mr. Marro, which should have been resolved without the necessity of a court appearance. In CL01-227 Marro filed 47 separate praecipes and 113 pleadings. In CL03-348 Marro filed 30 praecipes and 67 pleadings. These praecipes were initially scheduled on the Court's Motion's docket and frequently required separate times to be heard in their entirety. CL05-213 & CH05-157 (ultimately consolidated) included 20

separate praecipes filed by Marro with a total of 48 separate pleadings.

While Mr. Marro does not bear all of the responsibility for the extensive number of praecipes and motions filed in this matter, it is worth noting that no other litigant in the Court's experience has appeared so consistently on this Court's docket over matters which are ordinarily resolved out of Court, thereby obviating the necessity for constant adjudication. This Court must take note of the fact that all of Marro's filings required responses by counsel for Vepco.

Although prevailing on the merits of litigation alone does not justify sanctions, vexatious litigation reflected by repeated Court filings, with no relative probability of success, seeking damages of a minimal or indeterminable amount, compel a response by this Court in order to deter similar actions in the future. The first two actions failed in part, due to a lack of proof as to any recognizable monetary damage. The case at Bar suffers from the same deficiency. This court finds that the substance of these matters was litigated in the previous cases filed in 2001 and 2003. It seems that more trees have died for the purpose of providing paper during this litigation then were destroyed on Marro's property during the incident in question.

Despite this Court's stated concern over the current action, and its apparent lack of merit, the Court is awarding only 50% of Vepco's billed attorney's fees. As was noted by Marro himself and as evidenced by the pleadings, Vepco also filed a declaratory judgment action.

This was done presumably with the hope of avoiding future litigation on the subject of trimming trees around the power line. As a result, this Court felt that as there may have been some overlap or duplication not di-

rectly reflected in the billing statements, that any possible duplication should not be charged to Mr. Marro under 8.01-271.1. In reference to the actual amount submitted, the Court would observe that Mr. Marro had the opportunity to extensively examine Christopher Franklin, counsel for Vepco, on the witness stand while under oath. While a couple of the figures were questionable, it was very clear to this Court that Mr. Franklin was scrupulous in seeking to carefully identify his charges and to avoid going outside the parameters of the September 5th Order.

The Court further finds that counsel's billings were more than reasonable from his testimony and the experience this Court has had with attorneys who practice in this general area of the law. Therefore, considering the incredible volume of work which this case engendered and the large commitment of time required to see this matter to its conclusion, the court awards the sum of $8,300.00 to Virginia Electric & Power Company pursuant to 8.01-271.1 of the Code of Virginia.

The Court will direct Mr. Franklin to prepare the appropriate order, which should also be reflected as a final order in this case. This Order is to be a judgment order and will bear interest from the date of entry at the judgment rate until paid.

Sincerely yours,

/s/ Jeffrey W. Parker, Judge

A COPY TESTE: GAIL H. BARB, CLERK

BY: /s/ Nancy Heidt
Deputy Clerk
FAUQUIER COUNTY CIRCUIT COURT, VA

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday, the 25th day of September, 2007.

Donald C. Marro,
Appellant,

against Record No. 071290
Circuit Court Nos. CL05-213/CH05-157

Virginia Electric and Power Company,
Appellee.

Upon a Petition for Rehearing

On consideration of the "petition to reinstate appeal" of the appellant, which is treated as a petition to set aside the judgment rendered herein on the 1st day of August, 2007 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy, Teste:

Patricia L. Harrington, Clerk

By: /s/ Ebby Edwards
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

DONALD C. MARRO,
Plaintiff,

v. Case No. CL05-213

VIRGINIA ELECTRIC AND
POWER COMPANY,
Defendant.

and

VIRGINIA ELECTRIC AND
POWER COMPANY,
Plaintiff,

v. Case No. CH05-157

DONALD C. MARRO,
Defendant.

Warrenton, Virginia
Tuesday, October 17, 2006

A hearing in the above-styled matter before the Honorable Jeffrey W. Parker, Judge of the Circuit Court of Fauquier County, in the North Courtroom of the Courthouse thereof, 40 Culpeper Street, Warrenton, Virginia, on the 17th day of October, 2006, set for 9:00 a.m., when there were present on behalf of the respective parties:

A-P-P-E-A-R-A-N-C-E-S

On Behalf of the Plaintiff: No appearance was made on behalf of the Plaintiff.

On Behalf of the Defendant:

CHRISTIAN B. FRANKLIN, ESQUIRE
PARRISH HOUCK & SNEAD, PLC
P. O. Box 7166
Fredericksburg, Virginia 22404-7166
(540) 373-3500

P-R-O-C-E-E-D-I-N-G-S

[The court reporter having been duly sworn,

The matter was called at 9:34 a.m.]

THE CLERK: Donald C. Marro versus Virginia Electric and Power Company and Virginia Electric and Power Company versus Donald C. Marro.

THE COURT: I don't see Mr. Marro here, Mr. Franklin. Why don't you approach.

MR. FRANKLIN: Your honor, it's my understanding that Mr. Marro won't be here this morning.

THE COURT: That's what he said in his notice, he said he has pressing business. And then, of course, he put a matter on the docket which we haven't called yet with the intention not to appear because he was meeting with the Governor today, is what he advised us.

MR. FRANKLIN: If Your Honor wants to avoid taking this matter up, obviously, this is the motion to quash.

THE COURT: This is a motion to quash, and the way I feel about it, Mr. Franklin, if he's – you filed a motion to quash, he's filed a subpoena duces tecum. I don't anticipate you providing the information until I've ruled on your motion to quash. You've put it on the docket and he, for whatever reason, can't m ke it.

This matter is set to be heard, I believe, in what, about 10 days or so?

MR. FRANKLIN: There are matters set to be heard on the 26th.

THE COURT: On the issue of attorney's fees in this case?

MR. FRANKLIN: Yes, Your Honor.

THE COURT: Well, you know, he's got 10 days to get his case heard, you know, on the motion to quash between now and then. I wouldn't think you'd be too concerned about it.

So, you know, if he doesn't want to take the time to come down here and have a ruling, I guess he's not going to have his information. It kind of becomes a self-fulfilling event, doesn't it?

MR. FRANKLIN: Absolutely.

THE COURT: All right. Well, I don't think there's a whole lot for us to do right now.

MR. FRANKLIN: Thank you, Your Honor.

THE COURT: All right. Good to see you, Mr. Franklin.

[Whereupon, the proceedings were adjourned at 9:36 a.m.]

VIRGINIA:
IN THE CIRCUIT COURT OF FAUQUIER COUNTY

DONALD C. MARRO,
Plaintiff,

v. Case Nos.
CL05-213 and CH05-157

VIRGINIA ELECTRIC AND POWER COMPANY,
Defendant.

Warrenton, Virginia
Monday, July 31, 2006

A hearing in the above-styled matter before the Hon. Jeffrey W. Parker, Judge of the Circuit Court of Fauquier County, in the South Courtroom of the Courthouse thereof, 40 Culpeper Street, Warrenton, Virginia, on the 31st day of July, 2006, set for 11:00 a.m., when there were present on behalf of the respective parties:

Transcript Excerpts:
page 52, line 9 through page 55, line 12

MR. MARRO : I also tender to the Court with the utmost respect, there were three separate sets of pleadings in this matter, the first of which was the initial res judicata pleading, for which there was an opposition. Then there was a supplemental memorandum filed that elaborated the res judicata plea and inappropriately added a collateral estoppel portion to the res judicata plea, for which there was an opposition filed. And then there was a third supplemental memorandum filed by Virginia Power to which there was yet another opposition.

Your Honor, I'm not a particularly good speaker, but I am, I think, a thorough writer. And I believe that the Court has probably availed itself of each and every one of those pleadings. I believe the Court has reviewed the cases that I copied and furnished to the Court that were relied on in each of those pleadings. And so, in deference to the time allowed by the Court for this hearing, I'll conclude by offering the opportunity to the Court to ask any questions it may wish to ask about Opposition No. 1, Opposition No. 2 or Opposition No. 3.

And if the Court has no questions, I will submit then.

THE COURT: All right. Thank you, Mr. Marro. I don't think I have any questions at this time. Anything further you wish to close on in light of Mr. Marro's argument, Mr. Franklin?

MR. FRANKLIN: No, Your Honor.

THE COURT: It was rather succinct.

MR. FRANKLIN: Not with regards to his argument.

THE COURT: All right. All right, I'm going to say something, gentlemen, I had seriously pondered taking this case under advisement and writing an opinion on it and just really going through some detail and just saying all I wanted to say on this.

I will agree with Mr. Marro in terms of my limitations that – and I think probably for most of us, we can do a better job in writing than we can in speaking. There are very few of us that are so gifted orally that we can say what we want to say as well as when we sit down and try to put pen to paper with the opportunity to review our thoughts carefully and meticulously and hopefully put down what we want to say.

But I also have to confess to you, as evidenced by our late start today and by my schedule demands, I have limitations as to how much I can take under advisement and how much time I have to write these opinions. And I guess at the moment I don't really want to take advantage of that opportunity and afford myself that luxury.

So, at my own peril, I'm going to go ahead and go through these and rule at this time on these matters, because I really feel that I can, based on my understanding of what's going on here in this particular case, and make a determination.

It's clear to me, or at least clear to this Court, that – and, of course, as Mr. Franklin has indicated, we have one damage event, if we want to characterize it as a damage event. Mr. Marro, in his argument a moment ago, and I think in his pleadings, talked about the continuing trespass. Whether or not there is a continuing trespass, the fact remains there's only one continuing – there's only one claim for damages, and that, in this Court's view, has been adjudicated. That is really the essence of this whole issue.

Transcript Excerpts:
page 60, line 15 through page 63, line 12

THE COURT: What's perhaps troubling to this Court is the extent that maybe sanctions should be awarded. The Court's concerned about the extent of time this case has taken. This case has dragged on farther than it should and, in this Court's view, unnecessarily. There comes a point in time when someone's claim, after it's been adjudicated, needs to be put to rest.

If the relief is not obtained in this Court, there is the opportunity to seek a reversal from the higher court. It's happened to me, and it will happen again. Doesn't happen a lot, but occasionally. We all suffer through that from time to time. I think I've been affirmed more than I've been reversed, I'll say that much. But be that as it may, that's not the important consideration.

The important consideration is finality.

And there comes a point in time when this Court's ruled. If I'm not reversed, the game, so to speak, if you want to use that term, is over. The case is over, and it is no longer appropriate to bring these matters back in another form, another guise, under another heading, with an opportunity to get another bite at the apple. We have too many matters to litigate. We have too much to deal with to allow our processes to be influenced by that type of procedure.

I've ruled in reference to the declaratory judgment action and I think that still has some viability, perhaps, depending upon the parties' standing, but that's a different issue. That's a different matter. There may be some similarities eventually proved, but the fact of the matter is claims for damages and recovery for damages are not part of it.

What this Court is going to do is as follows. I'm going to allow a recovery under 8.01-271.1 for 50 percent of the time spent by defense counsel in preparing this motion in this matter. And I say half because even though I struck more than half of the counts, I'm going to give the defendant the benefit of the doubt in this matter.

So I will allow that to be set on a separate day, with verification of time spent sent to Mr. Marro, and grant an opportunity for this matter to be set down for a hearing, and this Court will consider the claim at that point in time.

Of course, I obviously have the opportunity and the discretion to use my judgment in terms of what I believe is a reasonable amount of a claim for the time spent in dealing with this portion of this action, but I will allow that.

I certainly note your exception, Mr. Marro.

And, of course, you will have the opportunity to give the Court of Appeals another bite at this proverbial apple, but that is what the Court is going to do in reference to this case for the reasons I've indicated. And that will be the order of the Court.

And I'm further going to direct the plaintiff in this matter to file no further actions in reference to this particular case seeking any recovery for damages. Any such actions that are filed will be met with sanctions, and I want no further motions filed for reconsideration. This is a termination of this case for damages on this issue.

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. _____

Donald C. Marro
Petitioner

v.

Virginia Electric and Power Company, Inc.
Respondent

PETITION FOR APPEAL

Donald C. Marro, pro se
3318 Bust Head Road
The Plains, VA 20198
540-253-5309 (tel)
540-253-5607 (fax)

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QUESTIONS PRESENTED

Error 1: Constructive Prescriptive Easement

Does failure to prove trespass damages in an earlier case confer a right of use to property? (Question 1.A)

In the circumstances here, was use of Petitioner's property without consideration and without proving easement when challenged to do so repeatedly an unconstitutional taking? (Question 1.B)

Error 2: No Continuing Trespass At-law Claims

Does failure to prove trespass damages in an earlier case preclude a continuing trespass claim if the trespass continues, or preclude other at-law claims arising from the continuing trespass? (2.A)

Does failure to prove trespass damages in an earlier case preclude trespass damages in a later action if the trespass continues? (2.B)

Error 3: Tree-trimming or Trespass

In a trespass action, is tree-trimming by the trespasser around its power lines the tort, or is the tort the trespass, i.e., placement of the power lines without an easement? (3.A)

In a trespass action, must all damage arising from an unauthorized tree-trimming done by the trespasser be in one action even if the damages are not manifest at the time of the first action? (3.B)

Error 4: Standing

Must a party own a property on which a Declaratory Judgment action was brought throughout the pendency of that action?

Error 5: Granting Injunctive Relief

May injunctive relief be granted merely on a declaratory judgment action, or is a showing required of being likely to prevail?

Error 6: No Oyer

Is a respondent in a chancery action to be denied Oyer because he is a plaintiff in a similar, and pending, action at-law?

Error 7: Particularity of Res Judicata Record

Is it still good law that the record relied on by the party seeking res judicata dismissal must be specified with great particularity?

Error 8: Sanctions

Is it still good law that 8.01-271.1 sanctions may not be awarded if a party meets a reasonableness test concerning the action? (8.A)

Is it still good law that discovery sanctions are awarded only when a party deliberately evades disclosure? (8.B)

Argument

As To Question 1.A

Does failure to prove trespass damages in an earlier case confer a right of use to property

Nothing in easements law confers right of use merely because proofs of damages from a trespass in an earlier action failed.

Prescriptive easement law puts the proof burden on the party claiming and requires nothing of actual or nominal damages from the party challenging unauthorized use. West, Easements, 7B VAD 548, sec. 4-10, 36, and cases there cited, including Wall v. Landman, 152 Va 889, 148 S.E. 779 (1929)

As To Question 1.B

In the circumstances here, was the use of Petitioner's property without consideration and without proving easement when challenged repeatedly to do so an unconstitutional taking?

Continued use by Respondent of Petitioner's property without compensation and without proving easement after having three opportunities to do so is an unconstitutional taking.

An unconstitutional taking is the use or appropriation of real property without compensation, the circumstances here.2

---

2. Tidewater Ry. Co. v. Shartzer, 107 Va 562, 59 S.E. 407 (1907); Richmeade v. City of Richmond, 267 VA 598, 594 S.E. 2d 606 (2004); Shooting Point LLC v. Cumming, 238 F.Supp 2d 536 (2002)

Petitioner contends the trial court constructively granted a prescriptive easement and permitted an unconstitutional taking in contravention of Article, I, section 11 of Virginia's Constitution by granting injunctive relief, denying continuing trespass and related causes of action, and dismissing Declaratory Judgment.3

Respondent never proved prescriptive easement yet continued using Petitioner's property. Without consideration.

Three times Respondent had an opportunity of proof, and each time dodged doing so. From this, the Court might reasonably infer Respondent has no such proofs. (Friend, Law of Evidence, sec. 10-17, 5th ed. 1999 and the cases there cited at footnotes 1 and 10)

---

3. also see, Bates v. Devers, 214 Va 667, 202 S.E.2d 917 (1974); Swentek v. US Air, 830 F.2d 552 (4th Cir 1987) [no unfairness]; Rye v. US Steel, 856 F. Supp. 274 (E.D. Va 1994) [same]; Campbell Co. v. Howard, 133 Va 19, 112 S.E. 876 (1922) [law implies promise to pay a property's worth]; Raven Red Ash v. Ball, 185 VA 534, 39 S.E. 2d 231 (1946) [damages for benefit received by use]

As To Question 2.A

Does failure to prove trespass damages in an earlier case preclude a continuing trespass claim if the trespass continues, or preclude other at-law claims arising from the continuing trespass?

Neither continuing trespass nor other causes of action at law arising therefrom, nor the negligence count were precluded by CL01-227 and CL03-348, the earlier cases.

Respondent's right to use Petitioner's property was never adjudicated, which defeats Res Judicata, (Gaskill v. Comm., 185 VA 440, 39 S.E.2d 296 (1946) [question of law not passed on not res judicata in later action; also, Johnson v. Powhatan Mining, 127 VA 352, 103 S.E. 703 (1920) [parties bound only so far as decree adjudicates their rights].

Moreover, res judicata is not for events yet to occur. Bayly v. Curlette, 117 Va 253, 84 S.E. 642 (1915); Griffin v. Griffin, 183 Va 443, 32 S.E.2d 700 (1945); Groh v. B.F. Saul, 224 Va 156, 294 S./E.2d 859 (1982)

Nor does judgment in a trespass suit which doesn't expressly permit the trespass affect suit for subsequent trespass. Douglas Land v. Thayer, 113 Va 239, 74 S.E. 215 (1912)4

Finally, neither the negligence count nor the tree-trimming was precluded by CL01-227 since the independent contractor defense used there by Respondent was wrong as a matter of law.5

Further, respondent waived Res Judicata in any event by filing its separate Declaratory Judgment action. Bill Greever v. Tazewell Nat'l Bank, 256 Va 250, 504 S.E.2d 854 (1998)

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4. A considerable body of law elaborates this further: [res judicata no bar when a Court expressly reserved plaintiff's right of action, In re: Palumbo, 182 B.R. 447 (E.D. Va 1995)]; [judgment not resting on multiple issues not conclusive to them, Patterson v. Saunders, 194 VA 607, 74 S.E. 2d 204, 207 (1953)]; [judgment conclusive only for what decided on the merits; if first case disposed of on ground not going to merits, finding not conclusive, City of Richmond v. Sitterding 101 VA 354, 43 S.E. 562, 563 (1903)]; [if suit's objects unaccomplished, no bar to second suit; Yates Adm'x v. Wilson, 86 Va 625, 10 S.E. 976, 977 (1890)]

5. [finding mediate or evidentiary facts no bar to reconsideration in subsequent suit, Moore v. U.S. 235 F. Supp 387 (W.D. Va 1964)]; [redetermination of issues warranted if reason to doubt quality, extensiveness or procedural fairness in (prior) suit, Montana v. U.S. 440 U.S. 147, 99 S.Ct. 970; [mistaken view of law or erroneous application of legal principles not res judicata, Robertson v. Comm. 181 Va 520, 25 S.E 2d 352 (1943); also, Linkous v. Stevens, 116 Va 898, 83 S.E. 417 (1914)]

As To Question 2.B

Does failure to prove trespass damages in an earlier case preclude trespass damages in a later action if the trespass continues?

> **Nothing in trespass law precludes continuing trespass damages simply because an earlier trespass action on the same property between the same parties had damages proofs that failed.**

The trial court itself recognized this:

> "there were proof problems [earlier], and if the case were perhaps presented this time, it might be a different result if it were approached differently" ((7/14/05 transcript. p. 114)

The Court also (and rightly) found prescriptive easement still remained to be proved, but then what effect would this have? If no easement is proved, then what, remove the lines and be obliged to pay nothing for when they were in place, or worse, leave the lines because there is no damages consequence for doing so?

Neither outcome is authorized in trespass or easements law, nor is either statutorily or Constitutionally sound.6

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6. The trial court also noted the Ejectment count differs from the earlier trespass count but held it should have been brought earlier, though nothing in the law requires that. In fact, the Court itself gave the reason for bringing Ejectment as brought, stating "trespass can occur, the person can leave", there is no ejectment. (7/31 T at 58) That is precisely the point: the person, Respondent here, can leave did didn't. Respondent stayed.

Virginia Code at 8.01-186 and 187, Article I, Sec. 11 of the Virginia Constitution, and Code sections 8.01-158 and 159 preserve Petitioner's right to damages, the latter expressly for Ejectment.

Further, while no Virginia cases address this directly, a West Virginia case, Lyons v. Fairmont R.E., 71 W.Va 754, 7 S.E. 525, has held only temporary damages are recoverable while a trespasser is in possession.7

Thus, precluding continuing trespass damages was wrong.

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7. see also, N&W Ry v. A. C. Allen & Sons, 122 Va 603, 95 S.E. 406 (1918) [if trespass not certain to continue, no recovery for continuing trespass]; Va Ry Co. v. Jeffries' Adm'r, 110 Va 471, 66 S.E. 731 (1909) [same]

As To Question 3.A

In a trespass action, is tree-trimming by the trespasser around its power lines the tort, or is the tort the trespass, i.e., placement of the power lines without an easement?

The tort is trespass, arising from use without easement.

Trespass damages8 arise from the trespass or an event related to the trespass, i.e., use of the property without easement and/or tree-trimming damage, Tate v. Ogg, 170 Va 95, 195 S.E. 496 (1938); B&O RR v. Patterson, 204 Va 81, 129 S.E. 2d 1 (1963), as to which damages are also protected under 18.2-119, 18.2-140 and 8.01-221.

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8. Furthermore, Declaratory Judgment is not the only remedy for continuing trespass. Chaffinch v. C&P Tel. Co., ??? Va ???, 313 S.E.2d 376 (1984)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 1st day of August, 2007.

Donald C. Marro, Appellant,

against Record No. 071290
Circuit Court Nos. CL05-213 and CHO5-157

Virginia Electric and Power Company, Appellee.

From the Circuit Court of Fauquier County

Finding that the appeal was not perfected in the manner provided by law because the appellant failed to timely file the petition for appeal, the Court dismisses the petition filed in the above-styled case. Rule 5:17 (a) (1).

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:

Deputy Clerk